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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 452nd MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 18 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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The meeting was called to order at 2.15 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 10 (continued)

1. Ms. KOSKELO (Observer for Finland), referring to article 10(1), said that if the receiving bank did not execute the payment order on the day of its receipt, it would not matter because deemed acceptance would not take place until the end of day two, and therefore the bank would not incur any harmful consequences for failure to observe the same-day rule. The rule set forth in article 10(1) should not cause the Commission any difficulty, because if there was no deemed acceptance until the end of day two, then in effect the same-day rule merely had the character of a recommendation. Since at the previous meeting (A/CN.9/SR.451, para. 43) the Commission had decided in principle to allow an extra day for deemed acceptance, she failed to see why there should be any argument about the same-day rule.

2. Mr. SCHNEIDER (Germany) said his delegation believed that the Model Law should provide for an extra day as a general rule, in particular to cater for the problems of small banks and regional banks. Banks which wished to follow the same-day rule could incorporate it into their individual contracts. The United Kingdom delegation had said at the previous meeting that a recommendation by the Commission of the European Communities had no legal force. His own delegation was not convinced by that argument and thought that the Commission of the European Communities expected its recommendations to be followed; if they were not, it would convert the recommendation into a directive.

3. Mr. CRAWFORD (Canada) said that in his delegation's opinion the important principle was same-day execution. It believed that those delegations which found difficulty with that principle should be content to rely on the opportunity to secure additional execution time which their banks were afforded by the power to set cut-off times under article 10(4). However, it was essential to ensure that banks could not secure an additional day through an amended article 10 and yet another by setting a self-serving cut-off time. In his opinion, therefore, it would be necessary to re-examine the cut-off time provision in order to restrict that freedom somewhat, but that might be difficult to do because banks which adhered to the same-day execution rule as a norm for their market had to be kept in mind as well.

4. Mr. KOMAROV (Union of Soviet Socialist Republics) said that his delegation approved article 10(1) as drafted by the Working Group. The provision seemed perfectly reasonable and consistent with the general principle of freedom of contract. His delegation understood the concern expressed by a number of delegations about an additional day for the execution of orders and was prepared to consider any compromise proposal on that subject.

5. Mr. BHALA (United States of America) said that at the previous meeting (A/CN.9/SR.451, para. 66) the United Kingdom representative had indicated that

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the real reason for upholding the same-day execution principle was that a "float" of funds could easily build up in the banking system if it was not adhered to. That referred, of course, to the situation in which the receiving bank would have the use of the sender's funds for a day and could invest them overnight.

6. Another point was the so-called "multiplier effect" produced by a system under which the originator sent a payment order to his bank on day one and execution occurred on day two; the bank then sent its payment order to an intermediary bank on day two and that bank executed the order on day three. His delegation favoured the same-day rule, not because his country had a sophisticated electronic banking system but because it was trying to accommodate the broadest possible types of payment order methods and take into account the interests of the originator and the beneficiary. In his delegation's opinion, a balance could be struck between those interests and the other interests traditionally raised in the Commission through the use of the cut-off time provided for in article 10(4).

7. Mr. BURMAN (United States of America) said that what was at stake was whether Governments would do their utmost to promote the flow of world trade. In his delegation's opinion, that could best be accomplished through the embodiment in the Model Law of the cut-off time principle, so as to encourage all banks to enhance their methodology in order to have access to new higher-volume systems of funds transfer. It was important to establish a standard that would best strike a balance between the interests of all concerned.

8. Mr. DE BOER (Netherlands) said that a compromise could perhaps be found by retaining the same-day rule but providing an exception whereby a receiving bank could set another time for executing a payment order.

9. The CHAIRMAN suggested that the matter might be dealt with in a footnote.

10. Mr. SCHNEIDER (Germany) said his delegation would find that solution unacceptable. A problem which arose in connection with a mandatory same-day rule was the need for the originator's bank to determine the appropriate routing by which to transmit the payment order to the beneficiary's bank. That problem did not arise for large banks but was a serious one for small and medium-sized banks.

11. Mr. HEINRICH (Bank for International Settlements) wished to convey to the Commission the concern felt by the representatives of a central bank that the same-day execution rule might be unrealistic for paper-based payment orders for small amounts. The Working Group had decided at its eighteenth session (A/CN.9/318, para. 17) that the Model Law should not differentiate between paper-based and electronic-based funds transfers, but he would like to press for a distinction to be made between them and suggested that article 10 might be the best place to do that.

12. The CHAIRMAN assured the observer for the Bank for International Settlements that his comments would be duly noted. It was true that practical

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problems would arise with paper-based transfers, but it was debatable how far that consideration should weigh with the Commission. As far as originators and beneficiaries were concerned, it was clear that the faster the service was the better. He wished to know what support there would be for saying that if the same-day rule could not function at all in practical terms, it would be better to agree on a two-day rule. Where practical difficulties were the major obstacle, it ought to be possible to leave the matter to agreement between the parties.

13. Mr. KAKOLECKI (Observer for Poland) advocated a more flexible solution than the same-day rule. He fully endorsed the views of the representative of Germany, which he knew to be shared by a number of delegations for whom a mandatory same-day rule would not pass the test of feasibility. He was in no doubt, moreover, that it would reduce the chances of future acceptance of the Model Law.

14. Mr. LE GUEN (France) said he had a number of comments on the afternoon's discussion. The first related to the Chairman's suggestion to deal by means of a footnote with the problem which the German delegation faced with the mandatory same-day execution rule. The same problem confronted his own delegation. If, as had been said, a recommendation of the Commission of the European Communities had no legal status, it must surely be admitted that UNCITRAL's Model Law would have even less. It would follow that a footnote to a Model Law which itself had little legal standing was scarcely an effective way of solving drafting problems.

15. The second point on which he wished to comment was that of the "float". He doubted if that was really the essence of the time problem, because the Model Law did not aim to regulate the terms on which banks charged their customers interest. There had been a lengthy discussion in the Working Group on various aspects of the notion of value date and it had been found that widely varying practices existed in that regard. In France there was no uniform law on value date, each bank, including the central bank, being free to adopt whatever date it wished.

16. Thirdly, in reply to the Chairman's question as to the possiblity of agreeing to a two-day rule, if the same-day rule could not function in practice, the problem might perhaps be approached from a different angle. He proposed combining the two ideas - the principle of same-day execution and the need for an extra day - in a rule which would state the primary principle of same-day execution and couple it with a proviso that, failing same-day execution, execution might at the latest take place on the following day. Whatever form of words was chosen to express that rule, article 3 should apply to it. That would leave a bank free, should it so wish, to incorporate in its contract provisions arrangements to execute orders within, say, a quarter of an hour or two hours of reception. The rule would do nothing to prevent systems from operating almost instantaneously, while allowing flexibility for certain kinds of transfer to take place on terms to be settled by the banks themselves.

17. The CHAIRMAN said he found the proposal of the representative of France very encouraging. By allowing an extra day for execution it would accommodate those transfers which for operational reasons could not be conducted on the same day, but at the same time it would enshrine the principle of same-day execution.

18. Mr. NEWMAN (United States of America) disagreed with the implication in the comments made by the representative of France that value dates were treated differently by different banks. He pointed out that France was one of the largest participants in the Society for Worldwide Interbank Financial Telecommunications (SWIFT), in which an accepted practice was the fixed value date. He could endorse the French proposal if the suggested rule was formulated in such a way as to include the words "with value backdated to original day", or wording to that effect.

19. The CHAIRMAN drew attention to the relevance of the French proposal to article 13, which would allow automatic clearance in case of refund by means of an adjustment of the credit date, i.e. the value date.

20. Mr. NEWMAN (United States of America) said that banks would always try to process payment orders as quickly as possible, given enough competition.

21. With regard to the Chairman's reference to article 13, he was of the opinion that the matters covered by that article and the French proposal were quite distinct. A forward payment based on the instructions of the originator and the originating bank was a payment which went forward to be paid on a certain date. The duty to refund was another matter altogether.

22. The CHAIRMAN replied that article 13 dealt with transactions which were not completed. In paragraph 15 of the Secretariat's commentary to article 13 (A/CN.9/346, p. 73) various measures were contemplated whereby interest could be adjusted by date shifts one day forward or one day back.

23. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) supported the French proposal.

24. Ms. KOSKELO (Observer for Finland) fully agreed that the Model Law should allow sufficient time for the execution of payment orders, but not if that meant creating a "float" in the banking system. She therefore approved the rider to the French proposal suggested by the United States. It was also desirable to deny the receiving bank any opportunity of misusing the possibility of deemed acceptance in order to create a "float". She strongly maintained that the issues of who should get the additional day's interest and how to eliminate the "float" were equally important.

25. The CHAIRMAN said that if the French representative accepted the United States suggestion, the result would be a provision expressing the same-day rule in principle while permitting a cut-off point at the end of the following day, with a rider that where execution took place on the following day, the credit should be backdated to the first day.

26. Mr. LE GUEN (France) said that the United States representative had alluded to the practice whereby banks applied previous-day value dates to payment orders executed on the day after they had received them. That was a perfectly reasonable practice, but it should not be catered for in the draft because it was not for the Model Law to regulate the terms on which banks should pay interest; such points were a matter of contract and lay in the field of banking competition.

27. The CHAIRMAN observed that article 16 dealt with allocation of the time value of funds and that interest was an important element in that.

28. Mr. SCHNEIDER (Germany) said that interest would not normally be payable unless the receiving bank had not fulfilled its obligation. There was a danger that small- and medium-scale banks would go out of business if they were required to complete execution on the day of receipt.

29. Mr. VASSEUR (Banking Federation of the European Community) said that he was in favour of the French proposal and hoped that the two-day rule would be incorporated in the Model Law. He felt, however, that banks themselves were best left to determine the practicable time-limits for execution. At the same time, article 10 should explicitly provide for the possibility of agreements which did not correspond to the general rule. There was thus a need to reconcile the wording of articles 6 and 10.

30. Mr. GREGORY (United Kingdom) said that he could accept the French proposal with the rider called for by the United States.

31. The CHAIRMAN said that, in view of the need to ensure genuine competition between banks, execution on the second day should be an exception. Unless he heard any objection, he would take it that the Commission agreed in principle to include in article 10 a rule worded along the lines proposed by the representative of France and including a rider of the kind proposed by the representative of the United States. He suggested that an ad hoc drafting group consisting of the delegations of France, Germany, the United Kingdom and the United States be asked to propose a suitable provision.

32. It was so agreed.

33. The CHAIRMAN said that, unless he heard an objection, he would take it that the square brackets enclosing the word "execute" should be deleted from the title and paragraphs 1 and 4 of article 10 and that those portions of the text should be referred to the Drafting Group.

34. It was so decided.

35. The CHAIRMAN recalled that the Commission had deleted from the draft a definition of the term "payment date", which had constituted article 2(m), on the understanding that article 10(1)(b) should be revised accordingly. He therefore suggested that the Commission might wish to approve the following text of article 10(1)(b) for referral to the Drafting Group: "the order specifies a date when the funds are to be placed at the disposal of the beneficiary and that date indicates that later execution is appropriate in

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order for the beneficiary's bank to accept a payment order and execute it on that date".

36. It was so decided.

Article 6 (continued)

37. The CHAIRMAN invited comments on article 6(2)(b), (c) and (d), by which he meant the provisions so lettered in the Working Group's draft (A/CN.9/344, annex) and not what would result from the rearrangement of article 6(2) decided on at the previous meeting (A/CN.9/SR.451, para. 46).

38. Ms. KOSKELO (Observer for Finland) said that in its written comments on the draft (A/CN.9/347, p. 20), her Government had proposed an additional provision to the effect that acceptance of the payment order should be regarded as taking place if and when the receiving bank debited the sender's account with the receiving bank in order to meet the payment order. Her delegation believed that the act of the receiving bank in debiting the sender's account should constitute acceptance.

39. Mr. BHALA (United States of America) said that, according to article 5(a), one of the ways in which payment of the sender's obligation took place was by the receiving bank debiting the account of the sender with the receiving bank. Since the Finnish proposal would make that action constitute acceptance, in fact deemed acceptance, he could not agree to it.

40. Mr. LE GUEN (France) supported the view expressed by the United States representative. Accepting the Finnish proposal might introduce into the Model Law the idea that banks could debit an account without executing the payment order at the same time, thus opening the door to doubtful banking practice.

41. Mr. DE BOER (Netherlands) pointed out that sub-subparagraph (i) of article 6(2)(a) (in the original arrangement) read: "... where payment is to be made by debiting an account of the sender with the receiving bank, acceptance shall not occur until there are funds available in the account to be debited sufficient to cover the amount of the payment order". Thus when sufficient funds were available the deemed acceptance could take place in one or two days. However, he considered that the act of the receiving bank in debiting the account could reasonably imply acceptance.

42. Mr. CRAWFORD (Canada) thought that the provision in question was correct as it stood in mentioning article 5(b) and (c) and in not alluding to article 5(a). Reference to the latter would conflict with sub-subparagraph (i). Article 5(a) dealt with the stage at which payment was made to a receiving bank by the bank debiting an account, but sub-subparagraph (i) could mean that deemed acceptance took place before the debit was actually made if there were funds available to meet the order.

43. Ms. KOSKELO (Observer for Finland) said that the problem was how to deal with the situation when the bank did in fact make a debit to the account. The

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purpose of her Government's proposal - contrary to the French representative's suggestion - was to ensure that if the account was debited, acceptance of the payment order took place at the same time and the bank became bound to execute it. The proposal was designed to avoid the possibility that the bank would debit the account and not be deemed to have accepted the payment order at the same time. She did not think her proposal would give rise to questionable banking practice.

44. Mr. CRAWFORD (Canada) said that he had not understood that the Finnish suggestion was for an addition to article 6(2) rather than a substitution. He could therefore support it.

45. Mr. GREGORY (United Kingdom) was not opposed to the suggested addition; it was tantamount to saying that a bank that had paid itself should be treated as having accepted the order and must execute it. That did not, he thought, conflict with the rules about time of payment or deemed acceptance.

46. Mr. ABASCAL ZAMORA (Mexico) said that he had no difficulty in accepting the Finnish proposal.

47. Mr. BHALA (United States of America) said that the explanation of the observer for Finland had convinced him that her Government's proposal was unnecessary. There was already a deemed acceptance rule in articles 6(2)(a) (in the original arrangement) and 8(1)(a). He was concerned about changing the rule on deemed acceptance into a provision on when acceptance occurred and was unclear as to why such a provision was necessary.

48. Ms. KOSKELO (Finland) explained that at the previous meeting (A/CN.9/SR.451, para. 43) the Commission had adopted a proposal to allow an extra day for deemed acceptance. Accordingly, deemed acceptance would not take place until the end of the second day. If the payment order came in on the first day and there were sufficient funds in the account to meet it, under her Government's proposal acceptance would take place when the debit was made. There would then be a difference in the timing of the acceptance.

49. Mr. BHALA (United States of America) strongly opposed the Finnish proposal, which would nullify the Commission's decision to allow an extra day for deemed acceptance.

50. Ms. KOSKELO (Observer for Finland) stressed that her proposal did not concern deemed acceptance. For the receiving bank to debit an account of a sender was a conscious step and should, in her view, constitute acceptance. It had nothing to do with the deemed acceptance situation, which related to the problem that arose when the receiving bank did nothing.

51. Mr. ERIKSSON (Observer for Sweden) supported the Finnish proposal and agreed that it concerned something quite different from deemed acceptance. If the receiving bank debited an account of the sender, its act showed that it was prepared to issue the payment order.

52. Mr. VASSEUR (Banking Federation of the European Community) said that article 6(2)(d) (in the original arrangement) implied that the bank had to take an initiative. With the progress of computer technology, banking operations now took place immediately. He therefore proposed that the text of that provision should read: "when it executes the payment order received".

53. The CHAIRMAN said that he understood that point. However, in discussing the definition of the term "execution", the Commission had agreed (A/CN.9/SR.444, para. 26) that, if in its consideration of article 6(2)(d) it became apparent that the definition was unnecessary, it might be deleted. That appeared to be the case. He would therefore take it that the Commission approved the text of article 6(2)(d) reproduced in the annex to document A/CN.9/347 and that it deleted the definition of the term "execution" in article 2(1).

54. It was so decided.

The meeting rose at 5.05 p.m.